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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION NO. 33, An Unincorporated Association, and CHARLES M. ANDRE, *Petitioners,*

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF PETITIONERS

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In accord with permission given by the Chief Justice at the time of oral argument, petitioners herewith file their Reply Brief. The principal brief adequately discusses the question of whether the complaint indicates the existing labor dispute in respect to (1) time of delivery, and (2) sale of non-union goods. This reply is limited to a question of whether, under the allegations of paragraph 4 of the complaint, a labor dispute exists as to method and time of payment. Respondents argue strongly that the complaint on its face (and to which petitioners must be confined in their argument) indicates that the driver, member of petitioner

union, had at no time previous to the demands of July 26, 1945, had dealings directly with the respondent delicatessen, and that the payments or account had always been between the delicatessen and the bakery. Respondent contends, therefore, that the union demand for immediate payment by the delicatessen, rather than by the bakery, was purely the demand of an interloper disconnected with and unrelated to any labor dispute. The answer to that contention is as follows:

In the first place, the complaint on its face shows that the driver was no mere interloper, because the complaint alleges that the driver had, for a number of years at least, been delivering bakery products to the delicatessen and thus was performing a very definite service for the delicatessen. Furthermore, there is no indication (and it is not the fact) that there was any extortion of a sum of money involved in the demand or that the delicatessen was being required to pay double for the services, respondent not having already paid the bakery.

The complaint does indicate that the driver is engaged in the same industry as the respondent delicatessen. This fact would answer the contention that a newsboy or other person delivering to or performing services for an ultimate private consumer could create a labor dispute by making some demand respecting payment of wages or time of delivery. The ultimate consumer is not a person engaged in any industry, trade or occupation similar to that of the person performing the service.

What, then, is the precise labor dispute as indicated by the allegations in paragraph 4 of the complaint? That dispute involves an attempt by the union in question to impose upon the delicatessen the relationship of employer at least as to certain elements of the employer-employee relationship, namely, (1) the payment by the delicatessen rather than by the bakery of the sum due for services rendered and products delivered, and (2) the time of payment for such services, i.e., payment to be made immediately upon

delivery rather than waiting for accounts to be settled as between the delicatessen and the bakery. This petitioners assert this to be a controversy concerning the "association or representation of persons . . . *seeking to arrange* terms or conditions of employment," as set forth in Section 13(c) of the Norris-LaGuardia Act. The petitioner union, on the face of the complaint, is seeking to create a dual employer relationship whereunder some of the ordinary incidents of employment are dealt with by the bakery as the driver's principal employer and other incidents determined by the delicatessen as a partial employer. Nothing in the Norris-LaGuardia Act prevents persons in an industry from attempting to create employment relationships, dual or otherwise; on the contrary, in the *New Negro Alliance* case (*New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552) the organization in question was attempting to *create* an entirely new employment relationship regardless of the fact that the employer in question had had no previous dealings with the association and did not want to have any dealings or employment relationships with the members of the association. Similarly, drivers in the *Lake Valley Farms Products* case (*Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U. S. 91) were seeking to *create* an employment relationship by changing from the status of independent contractors to that of employer and employees. In the *Wohl* case (*Bakery & Pastry Drivers & Helpers* v. *Wohl*, 315 U. S. 769) the drivers were attempting to *create* an employment relationship by requiring the hiring of additional employees. The attempt here, as evidenced by the complaint, is to require the delicatessen to assume at least one important element of the employment relationship, namely, the payment for services by the delicatessen rather than by the bakery. Furthermore, the dispute involved the question of immediacy of payments. As alleged in the complaint, the demand was that the driver be paid "*immediately*" and without waiting for payments "in the regular course and upon adjustments made." Certainly, it cannot

be denied that the question of time of payment, the question of avoiding delays in payment, or awaiting adjustments of differences between the delicatessen and the bakery is an important term or condition of employment. Similarly, it is obviously an important term or condition of employment to determine just whom the drivers are to look to for payment for services rendered.

Petitioners contend that not one but three distinct labor disputes are clearly set forth in the complaint, namely, (1) time of delivery; (2) person by whom the driver is to be paid for services and the time or immediacy of payment, and (3) sale of non-union goods; and any one is sufficient to bring the Norris-LaGuardia Act into play. Compare the factual situation in *Hunt* v. *Crumboch*, 325 U. S. 821, where this Court held that a concerted course of activity by a labor organization against an employer with whom it had no employment relationships and desired none, resulting in driving the employer out of business, was protected activity under the Sherman Act as narrowed by the Norris-LaGuardia Act.

It is petitioners' final contention that, unless the allegations of a complaint seeking an injunction against peaceful picketing and other types of labor activities declared non-enjoinable under the Norris-LaGuardia Act except under certain circumstances, clearly negatives on its face any possibility that a labor dispute exists (assuming, however, that the complaint is strictly construed in favor of the complaint), the procedural safeguards of the Norris-LaGuardia Act should be observed and testimony taken, with opportunity for cross-examination, so that the true facts can be ascertained. Any other rule would permit such peaceful labor activities sanctioned not only under the Norris-LaGuardia, Clayton and Sherman Acts, but also sanctified as a concomitant of the civil rights of speech and assembly, to be enjoined upon the allegations of a complaint cleverly framed to avoid the restrictions of the Norris-LaGuardia Act. Certainly, where, as in the present case,

employees in the same industry as the complainant are being threatened with an injunction against such peaceful, concerted labor activities, and where there is ample indication at least of the possibility of a labor dispute, and the complaint strictly construed does not negative any such possibility, then the District Courts should be required to bring witnesses before it and determine the facts on the basis of the sworn testimony.

Respectfully submitted,

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